OUTER HOUSE, COURT OF SESSION

2021 CSOH 88

P176/21

OPINION OF LADY WISE

in the petition of

BRUCE WISEMAN

Petitioner

against

PAROLE BOARD FOR SCOTLAND

Respondent

Petitioner: Crabb, Advocate; Drummond Miller LLP
Respondent: Lindsay QC; Anderson Strathern LLP

25 August 2021

Introduction

[1] The petitioner is a life prisoner having been convicted of murder in 2000. The punishment part of his sentence was fixed at 11 years backdated to 22 November 1999. On the face of it, therefore, by 2020 he was some 10 years past his tariff date. Mr Wiseman challenges the decision of the Parole Board on 18 December 2020 to refuse to direct his release. It was a majority decision. The petitioner contends that the decision was irrational and unreasonable insofar as it indicated that further testing in the open estate should be attempted before final release. Further, it is said that the respondent's consideration of the

proposed risk management plan for the petitioner in the community was irrational and unreasonable. It is also contended that the respondent failed to provide adequate reasons for its decision. The petitioner seeks reduction of the decision and a remit to a new tribunal to consider his case.

Factual background

[2] Following his conviction in May 2000 at Glasgow High Court, the petitioner was imprisoned until 2014. In December 2010, while still in prison, he was found guilty of two assaults and sentenced to 4 months and 14 days imprisonment. Following his release on parole in May 2014 he remained at liberty until his licence was revoked on 6 April 2016 but was released again in 2018. On 17 May 2019 his licence was revoked again and in June 2019 he was sentenced to 4 months imprisonment for contraventions of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and section 90(2)(A) of the Police and Fire Reform (Scotland) Act 2012. Details of the index offence and the subsequent matters that led to the revocation of his licence are contained in the dossier that was available to the respondent and is lodged as number 6/1 of process in these proceedings.

[3] On 15 April 2020 a community based social worker reported that she could not support the petitioner's release until he had presented to the Programme Case Management Board ("PCMB") for determination of any outstanding work to reduce the risk of his further offending. The social worker stated that such an assessment would assist in identifying whether the risk posed by the petitioner could be managed in the community. On 30 April 2020 the prison based social worker involved stated that she could not support the petitioner's release before the outcome of the PCMB was known. Then on 9 June 2020 the

prison based social worker provided an updated risk assessment for the petitioner. The petitioner's LSCMI assessment was medium in terms of both risk and need, with a reduction in risk due to his participation in full time learning while in prison. At that time the social worker did not change her recommendation regarding release. However on 9 July 2020 the same social worker provided an updated report based on the outcome of the PCMB and her discussions with the community based social worker. At that point she supported the petitioner's release on licence. The community based social worker similarly supported the petitioner's release on licence in July 2020. Both social workers thought there would be little benefit to the petitioner in progressing first to the open estate.

[4] The respondent's tribunal ("the tribunal") was due to hear the petitioner's case on 20 July 2020 but adjourned the matter due to the non-availability of the community based social worker. The tribunal considered that her evidence was key to the decision-making process. On 13 November 2020 the prison based social worker provided an updated report with no change to the conclusions and support of release. On 16 November 2020 the tribunal was again adjourned this time to obtain an update from the prison based social worker on the petitioner's engagement with a course designed to address alcohol issues and for an update on her recommendation in relation to release. The tribunal also asked that the community based social worker be cited to a further tribunal hearing to provide information on the petitioner's possible manageability in the community. Prior to the December hearing the prison based social worker provided an update on the courses in which the petitioner had participated. The community based social worker provided an updated report on 10 December 2020. This confirmed that during the last two periods he had been released on licence the petitioner did not have access to alcohol services but stated that were he to be

released he would be referred to the Community Addiction Recovery Service ("CAReS") to understand his triggers and patterns. Two community based social workers gave evidence to the tribunal on 18 December 2020, the petitioner's supervising officer (CS) and her team leader (BS) and both supported the petitioner's release on licence. Having considered matters the tribunal issued a decision dated 18 December 2020 refusing to direct the release of the petitioner. A minute with reasons was issued by the tribunal and forms number 6/2 of process in these proceedings.

The applicable test for release

[5] Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides:

> "(4) where the subjection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a […] life prisoner on licence.
>
> (5) the Parole Board shall give a direction under subsection (4) above unless –
>
> (a) the Secretary of State has referred the prisoner's case to the Board;
>
> and
>
> (b) the Board is satisfied that is it no longer necessary for the protection of the public that the prisoner should be confined".

The decision under challenge

[6] The minute of the decision under challenge (number 6/2 of process) runs to nine pages. The index and offending history are briefly set out together with a narration of the petitioner's progress in custody. The evidence of the community based social workers is then set out in some detail between paragraphs 21–36. The petitioner's evidence is summarised at paragraphs 37-43 and the submissions made between paragraphs 44-48. The tribunal's reasons start at paragraph 51 where it is confirmed that the Board took into

account the circumstances of the index offence and any offending history, the assessed medium level of risk and needs, the petitioner's conduct since sentence and intentions if released, all relevant information in the dossier and the evidence heard at the hearing. The operative part of the decision of the majority of the tribunal is in the following terms:

> "52. Two members of the Tribunal considered that it is necessary for the protection of the public that Mr Wiseman remain confined. They considered that neither Mr Wiseman nor his community based social workers know enough about his triggers for consuming alcohol to currently manage his risk adequately. He appeared to have engaged well in supervision appointments, but when challenged in 2019, he failed to make good decisions or think consequentially. He was therefore recalled for a second time. The Board were also concerned that in 2016, Mr Wiseman was charged with breach of the peace and assault to injury, with an allegation that he was intoxicated. Although he was not convicted of this offence, and Mr Wiseman denies behaving in this manner, the overall circumstances, when taken together with the incident in 2019, give concern in relation to his actions and decision making whilst in the community.
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> 53. Mr Wiseman's actions in socialising with his cousin and consuming cider in 2019 resulted in a further conviction. Whilst on this occasion his criminal behaviour attracted a short sentence, the matter could have been more serious given Mr Wiseman's offending history. The lack of understanding of why Mr Wiseman agreed to go to his cousin's house and accept alcohol is concerning, especially because the behaviour and outcome was stated as being entirely unexpected by his family and social workers. His mother is very supportive, but she did not anticipate that he was drinking alcohol with his cousin or about to come to the attention of the police. Mr Wiseman must increase his ability to talk about his thinking styles with his parents and supervising officer as well as learn to make good decisions when challenged.
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> 54. Mr Wiseman attended all his supervision appointments, but his personality is described as reserved. It remains a concern that he made an impulsive decision which led to further offending. The two members were not satisfied that Mr Wiseman is fully transparent about his life when he was questioned by his supervising officer, as demonstrated by the circumstances relating to his previous two recalls into custody. They were not convinced that the Risk Management Plan put forward by criminal justice social work was sufficient to manage Mr Wiseman's risk in the community, as it did not differ sufficiently from his previous management plan in the community which ended with two recalls to custody. It was a concern to the two members that Mr Wiseman appeared to lack adequate understanding of his triggers for alcohol consumption and associated offending for his safe management in the community, despite offence focused work being completed in prison and being supervised in the community. He admitted he did not understand his decision

making and lack of consequential thinking and nor did his supervising officer and this gives the members a concern that neither he nor his supervising officer currently understand the risk he poses or the skills he needs to identify risky situations and to keep himself safe in the community. Until he understands his thinking styles around risk, the risk to the public remains unmanageable because it is poorly understood.

55. The two members considered that his intention to abstain from alcohol consumption is a statement that they consider a positive personal goal to make, however, there is at least one occasion on file which demonstrates that Mr Wiseman has adopted this view previously, including as far back as 2014 at a previous tribunal. At present it remains a good intention, however there is insufficient evidence that Mr Wiseman has the skills to maintain his resolve or avoid negative peers or situations.

56. Further, while the two members acknowledge that the plan to supervise Mr Wiseman more frequently than before is necessary and considered, it does not overcome the issue that Mr Wiseman asks for release before any of the offence focused work which will increase his skill level has begun. The two members considered that it is imperative that Mr Wiseman begin some of this work in custody, as well as build trust and his relationship with his supervising officer in conditions of lesser security before he is released, particularly as there is evidence of previously him being unlawfully at large when he did not engage with the supervision process. They therefore did not direct release and fixed a review period of 12 months in order for Mr Wiseman to progress to the OE, to undertake home leaves and start to build his relationship with his supervising officer. It is anticipated this will include offence-focused work and an exploration for his triggers for alcohol use. He will also be given an opportunity to test himself further with all the life events that can occur in the community to ensure that he has a realistic relapse prevention plan in place to ensure that he has all the skills he needs to adhere to his licence conditions. Should Mr Wiseman choose to make use of this further support for community re-integration, it will provide him with the opportunity to accrue evidence which he can present to the Board at his next Tribunal to demonstrate that he is capable of making good decisions when he needs to".

Submissions

Petitioner

[7] Mr Crabb contended that the tribunal in this case had not demonstrated the level of deference required when someone such as the petitioner was confined well beyond tariff. He accepted that due deference must be given to the specialist nature of the tribunal and its highly trained and experienced members. However he contended that the respondent had

here failed to fulfil its duty when considered against a need for anxious scrutiny in such cases. Reliance was placed on *Brown* v *Parole Board for Scotland* [2021] CSIH 20 and particularly Lord Malcolm's views at paragraph 36 about the need for clear reasons and appropriate appreciation of the impact of confinement well beyond tariff. Mr Crabb described this as a requirement of anxious scrutiny. He pointed out that in *Crawford Petitioner* [2021] CSOH 44 Lord Braid had accepted that the principles enunciated in *Brown* were applicable. In that case, the relevant tribunal had adjourned for the evidence of social workers to be heard just as in this case, but had failed to explain why it had preferred the evidence of one social worker over another. Counsel anticipated that the respondent would rely on the Court of Appeal decision in *R (DSD, NBV and Ors)* v *Parole Board* and *Ors* [2019] QB 285 at paragraphs 116-121. However that decision had been before the Inner House in the case of *Brown* cited above, when the court had nonetheless stated that intense scrutiny of such decisions was required. The only difference in the Court of Appeal decision was that the court refused to characterise the matter as anxious scrutiny but described the approach required of the court as giving very careful consideration to the circumstances. In the present case, anxious scrutiny was required where two social workers started as sceptics in relation to the petitioner's position and initially felt his risk could not be managed in the community. It was important that the social workers had changed their views over time and that they were both of the view that a further period in the open estate would not assist risk management. The development of views from the cautious approach in the April to a conclusion in December 2020 that the risk was manageable imposed a heightened duty on the respondent to explain very clearly why the evidence of the social workers was being

rejected. The views of the community based social worker who would be responsible for the petitioner's supervision were particularly important.

[8] The petitioner's first substantive challenge was that the respondent's decision that further testing in the open estate was required was irrational and unreasonable. Paragraphs 52-54 of the decision set out the tribunal's justification in terms of the lack of understanding in relation to alcohol triggers. This had been a repeated concern on the part of the respondent and in July 2019 a tribunal had considered that the petitioner would benefit from further programme work to address his lack of consequential thinking. Since then Mr Wiseman has attended the Programme Case Management Board ("PCMB"), engaged with prison and community based social work and completed a course addressing alcohol abuse and drug addiction. The evidence did not support the respondent's decision for a number of reasons. These included that the petitioner (i) has been in the open estate on two prior occasions, (ii) had been in the community for significant periods of time before he got into difficulties (3 years on the first occasion and 10 months after his second release), (iii) had no access to alcohol services in the community on previous releases and (iv) has engaged with social work since his recall and has no outstanding offence work. Two other significant reasons were that the social work evidence to the tribunal was that home leave as part of time in the open estate was not an effective way of demonstrating the petitioner's longer term manageability in the community and that the main work to be done in respect of alcohol use could not be carried out until he was back in the community. The Covid 19 restrictions presented a further obstacle in the open estate.

[9] Counsel acknowledged that the respondent was entitled to reject the expert evidence, but submitted that the evidential basis for doing so did not withstand anxious scrutiny. The

respondent's position was contradictory, irrational and unreasonable. It seemed to be that the petitioner should not be released until his triggers were better understood and he can build a relationship with his supervising officer. That was contradicted by the evidence of the social workers who said that the best way of understanding those triggers was to release the petitioner into the community and build a relationship with his supervising officer, all in terms of a robust management plan. Further, the respondent's decision that the petitioner should spend time in the open estate until the aforementioned requirements were met was contrary to the social work evidence that further time there would not be beneficial in achieving those goals. Separately, the tribunal had not explained adequately why it did not agree with the expert evidence on these matters. The reasons provided in paragraph 56 were generic and fell below an acceptable public law standard. It was simply not clear what else the petitioner could have done to persuade the respondent to direct release.

[10] The second substantive challenge was that the respondent's consideration of the future risk management plan was irrational and unreasonable. At paragraph 54 the tribunal stated that the majority were not convinced that the plan put forward by criminal justice social work was sufficient to manage the petitioner's risk in the community because it did not "differ sufficiently from his previous management plan in the community which ended with two recalls to custody". While it was not clear why the Tribunal considered the current plan was not sufficiently different, Mr Crabb submitted that in fact it differed significantly in a number of respects. This time the petitioner would receive ongoing support from the alcohol services CAReS and his community based social worker would be part of the planning meeting with that service. The petitioner's level of supervision would remain at weekly and any reduction would be gradual and there would be a visit to his parent's house

every 6 weeks to understand the family dynamics. Further, Mr Wiseman would take part in a structured programme over several weeks and his risk assessment would be updated during that period to assess further needs. Finally, this time there would be a condition that the petitioner did not enter the street where he had extended family and the previous recall incident occurred and potentially electronic tagging in addition. None of these conditions or supports were available when the petitioner was released previously. Accordingly, the evidence did not support the respondent's conclusion that the new plan was not sufficiently different from those in place on previous occasions.

[11] The heightened duty to provide an explanation for rejecting expert evidence had again not been fulfilled. There was no assessment of the petitioner's alcohol qualification and his engagement with that work and no assessment of the use of electronic tagging as part of risk management. These two issues had both been highlighted as material considerations at the hearing of 16 November 2020, when it had been adjourned for further information about them to be obtained. In those circumstances the petitioner was entitled to expect that they would be addressed within the reasons section of the decision of 18 December 2020. If one or both of the substantive challenges was upheld the decision should be reduced.

Respondent

[12] Senior counsel for the respondent submitted that there was little between parties on issues of law. All that required mention was first, the issue of anxious scrutiny being required where the punishment part of a prisoner's sentence has expired and secondly the court's approach when exercising the supervisory jurisdiction in a challenge to the decision

of a specialist tribunal. On the first of these, any difference between anxious scrutiny (*Brown* v *Parole Board for Scotland* [2021] CSIH 20, at paragraph 36) and "very careful, extended consideration" *(R (DSD, NBV & others)* v *Parole Board & others* [2019] QB 285, at paragraph 129) was semantic only, as the test remains one of reasonableness or rationality. Mr Lindsay was content to accept that the band of reasonableness narrowed when it came to matters of liberty and that the length of the post tariff period was relevant, although the statutory test was the same regardless of that factor. There could be no question of a presumption of liberty after a certain period and in life sentence cases the right to liberty was diluted in comparison with a determinate sentence. In any event, every decision of the tribunal in a case of this sort was a weighty one with grave consequences and so the court requires to look very carefully at the basis for the decision and the reasons given.

[13] The concession by the petitioner about the due deference that must be given to a specialist tribunal was an important one. The court must recognise that there is an expertise that the court does not possess and so the tribunal is best placed to make decisions on the facts. A misinterpretation of the law would be different and an example of when the court is best placed to decide. The facts of the current case, where the risk is that the consumption of alcohol will trigger violence, the issue of whether that risk should be managed first in the open estate goes to the heart of the specialism exercised by the tribunal. The court must be steadfastly astute not to interfere with the tribunal's assessment of risk, save in the most exceptional case: *B* v *Parole Board for Scotland* 2020 SLT 975, per Lord Pentland at paragraph 64; *R (X)* v *Secretary of State for Justice* [2017] 4 WLR 106 at paragraph 46 and *R (Carman)* v *SSHD* [2004] EWHC 2400 at paragraph 33. In relation to the inadequate reasons challenges, the law was well settled and had been summarised usefully by

Lord Braid in *Crawford* v *Parole Board for Scotland* [2021] CSOH 44. In essence, the adequacy of the reasons must be judged in the context of the issues that called for a decision. In the present case the issue was the risk of alcohol giving rise to violence. The question for the tribunal was how that admitted risk could be managed and the tribunal's decision addressed that question in a manner open to it.

[14] Senior counsel analysed the tribunal's decision and submitted that it was a lawful and reasonable one. The tribunal had noted (at paragraph 19) that the petitioner had not completed the Substance Related Offending Behaviour Programme (SROBP) and also (at paragraph 20) that he had by the date of the hearing submitted an application form to progress to the open estate. The two witnesses whose evidence the petitioner sought to rely on had acknowledged to the tribunal that the protective factors currently present had been present in the community at the time of the recall incident - paragraph 28. These were that Mr Wiseman could live at home with his parents and his father (who has a business) could provide him with some work These protective factors had not been sufficient in 2016 or 2018 to prevent a recall to prison. Paragraph 28 also recorded that the aim of the future risk management plan was for the petitioner to build a more transparent relationship with his supervisors, an acknowledgement that such a relationship did not yet exist. One of the community based social workers told the tribunal that the local authority had no facilities to test for alcohol use

> "...so if the Board released Mr Wiseman with a licence condition to abstain from alcohol use, monitoring this would be dependent on Mr Wiseman's openness and honesty in supervision in addition to any observations made upon his body language and presentation" (paragraph 31).

So while the witnesses accepted that alcohol was the issue there would be no independent method after release of assessing whether the petitioner was managing to abstain. That it

would be for the petitioner to take responsibility for being open and honest was repeated by the second social worker who stated also that he has a reserved personality (paragraph 33).

[15] Turning to the petitioner's evidence to the tribunal, he had stated that he still did not understand his decision making on the occasion that he accepted three-four tall glasses of cider at his cousin's house in May 2019 (paragraph 40). This relapse had led to the second recall. It would be hard to be confident that the petitioner could avoid the triggers for further relapse when he did not understand why such triggers arose. It was noteworthy too that the petitioner was positive in his evidence about the open estate, saying it was a good place to go to learn how to be in the community (paragraph 43). His view that he did not need to go back there had to be set against the undisputed fact that the previous gradual progression to liberty was not enough to prevent his re-offending on the previous occasion in 2019.

[16] In the reasons section commencing at paragraph 52, it was clear that the tribunal, having identified the correct test, had identified that neither the community social workers nor the petitioner knew enough about his triggers for consuming alcohol to manage his risk adequately at this stage. The decision explains adequately what the features were that resulted in that lack of knowledge militating against release. The petitioner's lack of understanding about why he had accepted alcohol on the occasion in 2019 was a factor, together with the established circumstances of both situations that led to recall, albeit that in the absence of a criminal conviction for the 2016 incident, less weight was placed on that. Mr Wiseman's reserved personality and inability as yet to talk about his thinking justified the majority in the conclusion that a system that required his full transparency could not be relied on. On the issue of whether the new Risk Management Plan was sufficiently different

from the previous one, the tribunal was aware that the only real difference between the plans was the increase in frequency of appointments with the supervisor. This was not significant when the triggers for the petitioner's behaviour were still not understood. This lack of understanding fed into the tribunal's criticism of the plan. The tribunal saw that the petitioner's intentions were good but the evidence pointed to his not yet having the skills to achieve his goals.

[17] Nothing in the evidence could overcome the issue that the petitioner had asked for release before any of the offence focused work that would increase his skill level had begun. The majority considered that it was imperative that some of the necessary work begin while the petitioner is still in custody, at the same time as building trust. Once it was understood that the central issue was the triggers for alcohol consumption it became clear that this decision fell within the spectrum, albeit a narrow one, of reasonable decisions open to the tribunal. The majority concluded that the petitioner should be given an opportunity to demonstrate that he can comply with conditions, something that a move to the open estate could facilitate, as he would have home leaves, regular visits with his supervising officer and opportunities to test himself further.

[18] On the above analysis, it was clear that the challenges to the decision must fail. The reasons complied with the test in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345. The petitioner will understand why he has not yet been released. It had been acknowledged that the tribunal was not obliged to accept the views of the social workers and the reasons for not doing so were adequate and comprehensible. On the substance of the issue, the decision was an example of a specialist tribunal exercising its core function of

assessing risk of those who can only be released on satisfaction of the statutory test. The decision made was lawful, reasonable and open to the tribunal on the available evidence.

Discussion

[19] There can be no doubt that the court must examine very closely relevant challenges to decisions whose effect is to continue to confine those whose tariff or punishment part has long since expired. In *Brown* v *Parole Board for Scotland* [2021] CSIH 20, Lord Malcolm summarised (at paragraphs 36 and 37) the approach to be followed in a case of this sort:

> "To justify continued confinement the danger posed by the prisoner must involve a substantial risk of serious harm to the public, ie involving offences of serious violence. (From time to time reference has been made to a 'life and limb' test). The longer the time in custody after expiry of the tariff the scrutiny should be ever more anxious as to whether the level of risk is unacceptable… Under the modern context-specific approach to rationality and reasons challenges, in the area of detention and liberty the court must adopt an anxious scrutiny of the decision. The court can interfere if the board's reasoning falls below an acceptable standard in public law. The duty to give reasons is heightened if expert evidence is being rejected…
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> …While a cautious approach is appropriate when public protection is in issue, as time passes it is not only legitimate but necessary for there to be appropriate appreciation of the impact of confinement well beyond tariff. The decision-maker should ensure that it is apparent that this approach has been adopted and its reasoning should provide clarity as to why confinement remains necessary in the public interest".

While the Inner House was dealing with the permission stage of a judicial review in that case, the approach stated is clearly applicable to the substantive determination of the petition. I do not need to decide whether the perceived difference in approach between the Court of Appeal in *R (DSD, NBV & others)* v *Parole Board & Others* [2019] QB 285 is more than semantic; I must follow the approach of the Inner House in *Brown.* In any event, it seems to

me that there is effectively consensus that confinement beyond tariff is something that can never be condoned unless the decision withstands the closest analysis.

[20] So far as reasons challenges are concerned, the authorities were summarised recently by Lord Clark in *Hutton* v *Parole Board for Scotland* 2021 SLT 591 at paragraph 62 and repeated by Lord Braid in *Crawford Petitioner* [2021] CSOH 44. The test is well known and is uncontentious. What does bear repeating is the acknowledged due deference that must be afforded to specialist tribunals, in particular to the Parole Board. In *R (D)* v *Parole Board* [2019] QB 285, the Court of Appeal cited Stanley Burnton J who had, in *R (Alvey)* v *Parole Board* [2008] EWHC 311 reiterated that it was not for the court to substitute its own decision, however strong its view, for that of the Parole Board. The court in *R (D)* also cited the observations of Lord Phillips of Worth Matravers CJ in *R (Brooke)* v *Parole Board* [2008] 1 WLR 1950 that:

> "Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the board is satisfied that there is **no risk** that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the board's judicial function".

[21] The decision of the tribunal in this case was a finely balanced majority one. Such determinations are highly fact sensitive and the evidence at the hearing is one of five matters to which the tribunal has regard. The starting point is the index offence, the petitioner's murder conviction, which led inevitably to a life sentence. He had carried out a violent attack with a knife and the victim had subsequently died of the injuries inflicted. The circumstances of the two recalls to custody since his initial release were highly relevant to

the assessment of risk, with the 2019 incident and conviction requiring particular attention. The evidence before the tribunal concentrated on the witnesses' understanding of those events and what they disclosed about the petitioner's relationship with alcohol as a backdrop to consideration of the proposed plan for his management in the community.

[22] Counsel for the petitioner divided his submission into separate challenges about the decision on the requirement for further testing in the open estate and then consideration of the proposed risk management plan. Of course, the substantive decision was whether to release or not, albeit that different aspects of the reasoning may be challenged. In essence, this is a case where the petitioner had the support of the two social work witnesses on both aspects now challenged and the tribunal did not follow their recommendation. I accept that good reasons for not doing so were required. However, the situation here is not one where evidence is rejected on credibility grounds or where two skilled witnesses express conflicting views and one is preferred. For example, in *Crawford, Petitioner* [2021] CSOH 44 Lord Braid reduced the tribunal's decision where no explanation was given for preferring the evidence of one social worker over another. In contrast, the tribunal's decision about Mr Wiseman did not centre simply on a rejection of the social work evidence. That evidence was carefully summarised and taken into account but when considered with the other evidence and available material in the round, was not sufficient to persuade the tribunal that the risk posed by the petitioner could be managed in the community at this stage. For example, the tribunal's conclusion (at paragraph 52) that neither Mr Wiseman nor the community based social workers know enough about his triggers for consuming alcohol to currently manage his risk adequately was based on accepted evidence from both those sources and recorded in the decision at paragraphs 22, 23 and 40. Thus the basis for the

conclusion emanated from the petitioner himself, first through the social workers and then in his evidence to the tribunal.

[23] Turning to the specific issue of the decision that further testing in the open estate was required, the tribunal records all of the evidence suggesting that this would not be beneficial. Such evidence was acknowledged but could not, in the tribunal's view, overcome the undisputed fact that Mr Wiseman had asked for release before any of the offence focused work had begun. Progressing to the open estate was deemed to be part of the necessary steps towards release, rather than a blanket refusal of the notion of release. Mr Crabb contended that the fact of the petitioner's time in the open estate and the previous periods of time he had been in the community without trouble supported the social workers' view on this point. That the previous periods in the open estate had clearly not been sufficient by way of transition to prevent the further two recalls to custody does not, however, inevitably render another attempt at such a transition clearly without benefit. A further transfer to open conditions was something the petitioner had applied for, albeit it was not his primary aim. As he had not completed the Substance Related Offending Behaviour Programme when the tribunal was making the decision, there was a rational and reasonable basis for delaying release until relevant work had been carried out. The tribunal's reasons for building up towards release in the open estate included that it would facilitate the development of trust and a relationship with the supervising officer in conditions of lesser security. The evidence of the petitioner previously being at large unlawfully when he did not engage with the supervision process is relied on in support of the stated imperative. In summary then, the tribunal considered the evidence about whether a transfer to the open estate had any value and decided that it did because the alternative proposed by the social

workers of full release with more frequent supervision did not address the lack of offence related work to date. To put it another way, the proposal for frequent supervision in the community was not ruled out as something to aim for, but its implementation would, in the tribunal's opinion, be premature. That was a decision open to the tribunal on the available evidence and other material. The clear tenor of the decision is that so long as the petitioner now uses his home visits appropriately, full community reintegration will follow. He should be in no doubt as to why he is being transferred to the open estate rather than released. I consider that the reasons given on this aspect are succinct but adequate and convey to the petitioner why the tribunal did not follow the recommendation. They can be summarised as (i) the need to carry out offence focused work before full release, (ii) the advantage of using home leaves to self-test and start to understand triggers and (iii) provision of an opportunity to build trust before full release. These reasons were all relevant to the petitioner's particular circumstances and readily understandable. It follows that both the reasonableness and reasons challenges to this aspect of the decision fail.

[24] On the second challenge of the consideration by the tribunal of the risk management plan, the issue was whether the plan presented in December 2020 was sufficiently different from those in place when the petitioner had been released but subsequently recalled to custody. Again the tribunal had not followed the social workers' recommendation and it was said that there were no clear reasons for this or for the conclusion that the plan was not different enough. This challenge goes to the heart of the tribunal's assessment of risk. The available material illustrated that, if the petitioner was released, he would go to the same home circumstances to which he had been released in the past. His family represent protective factors as the information suggests they are stable and supportive of their son and

his situation. The previous recalls were against a backdrop of that support having been available. The main feature of the proposed new plan was more frequent supervision appointments. Additional conditions of keeping away from extended family at whose home the petitioner had consumed alcohol previously would not address the core risk. It was not incumbent on the tribunal to undertake a line by line comparison of the previous and current plans and it is clear enough from the reasons stated that the new plan was not sufficiently different because it did not (and could not) address that core risk without a greater understanding on the part of the petitioner himself.

[25] So the key risk remained that of consumption of alcohol as a trigger for unlawful behaviour as had occurred in the past. While the tribunal acknowledged the petitioner's current good intentions and the plan to supervise more frequently, the majority considered that Mr Wiseman's lack of understanding of his previous poor decision making and inability to think consequentially militated against full release. The supervising officer was similarly unable to understand the relevant risk or identify the skills that the petitioner would need to be safe in the community. Paragraph 55 of the decision explains why the tribunal considered that the petitioner's good intentions are not sufficient to negate the risk. On reasons, again the petitioner should be in no doubt about why the tribunal rejected the proposed plan as unsuitable for implementation in advance of the necessary work being carried out.

[26] In conclusion, having considered the decision as a whole and the two discrete challenges to it, I can discern no error that robs it of logic or any other similar reason why it should not stand. It is a carefully constructed analysis of material and evidence heard by a specialist body. The situation was one where there were two potentially reasonable

conclusions on whether or not the petitioner could currently be managed safely in the community. The route chosen by the tribunal of a transfer to the open estate as part of a gradual process of release and building up of necessary relationships and offence focused work fell squarely within the narrow band of decisions open to it. In the context of the decision being made the reasons given are easy to understand and adequately expressed. The context of the application being by a post tariff prisoner is a relevant feature of the case but it does not result inexorably in the tribunal being unable to reach a decision that does not accord with the social work recommendation.

Decision

[27] For the reasons given, I will sustain the fourth plea in law for the respondent and refuse the petition, reserving meantime any questions of expenses.